(11) (10)

Nos. 95-966 and 95-977

Supreme Court, U.S.
FILED
AUG 21 1996
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE,
MINORS, PETITIONERS

v.

UNITED STATES OF AMERICA

KELLY M. O'GILVIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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6 pp

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

This supplemental brief is filed pursuant to Rule 25.5 of the Rules of this Court to bring to the attention of the Court legislation that was enacted after the date that the brief of the United States was filed in this case.

1. On August 2, 1996, Congress enacted the Small Business Job Protection Act of 1996. The President signed the Act into law on August 20, 1996. Section 1605(a) of the Act amends Section 104(a)(2) of the Internal Revenue Code to exclude from income (emphasis supplied):

> the amount of any damages (*other than punitive damages*) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal *physical* injuries or *physical* sickness.

Section 1605(b) of the Act further specifies that:

> For purposes of [Section 104(a)(2) of the Internal Revenue Code, as amended], emotional distress shall not be treated as a physical injury or physical sickness.

Section 1605(d) of the Act provides that these amendments apply "to amounts received after the date of the enactment of this Act" except for amounts received "under a written binding agreement, court decree, or mediation award in effect on (or issued on or before) September 13, 1995."[1]

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[1] The entire text of Section 1605 of the Small Business Job Protection Act of 1996 is set forth in the Appendix, *infra*. The amending language that limits the statutory exclusion to damages resulting from "personal physical injuries or physical sickness" significantly narrows the general scope of that provision. See *United States* v. *Burke*, 504 U.S. 229, 242 (1992) (Scalia, J., concurring in the judgment).

In adopting these amendments to Section 104(a)(2) of the Internal Revenue Code, Congress noted that courts have been in disagreement as to whether punitive damage awards are excluded from income under the prior text of that Section. The Conference Report states that, in resolving that issue

2. The principal question presented in these cases, which are scheduled for argument on October 9, 1996, is whether punitive damages awarded in a suit involving personal injuries are excludable from income under Section 104(a)(2). The amendments to Section 104(a)(2) contained in the Small Business Job Protection Act of 1996 do not resolve that question with respect to payments of punitive damages made prior to the date that the amendments were enacted—and therefore do not resolve that question in the present cases. See note 1, *supra*.[2]

Respectfully submitted.

WALTER DELLINGER
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AUGUST 1996

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prospectively, "[n]o inference is intended" as to the proper interpretation of the statute prior to its amendment. H.R. Conf. Rep. No. 737, 104th Cong., 2d Sess. 301 (1996).

[2] Because Congress has prospectively determined for all tax years after 1996 that punitive damages awards are *not* to be excluded from income under this statute, however, the Court may wish to consider dismissing the writs of certiorari in the present cases as improvidently granted. See also 95-966 U.S. Br. in Opp. 5-8.

APPENDIX

Section 1605 of the Small Business Job Protection Act of 1996 provides:

> **(a) IN GENERAL.**—Paragraph (2) of section 104(a) (relating to compensation for injuries or sickness) is amended to read as follows:
>
> "(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;".
>
> **(b) EMOTIONAL DISTRESS AS SUCH TREATED AS NOT PHYSICAL INJURY OR PHYSICAL SICKNESS.**—Section 104(a) is amended by striking the last sentence and inserting the following new sentence: "For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care (described in subparagraph (A) or (B) of section 213(d)(1)) attributable to emotional distress.".
>
> **(c) APPLICATION OF PRIOR LAW FOR STATES IN WHICH ONLY PUNITIVE DAMAGES MAY BE AWARDED IN WRONGFUL DEATH ACTIONS.**—Section 104 is amended by redesignating subsection (c) as subsection (d) and by inserting after subsection (b) the following new subsection:

"(c) **APPLICATION OF PRIOR LAW IN CERTAIN CASES.**—The phrase '(other than punitive damages)' shall not apply to punitive damages awarded in a civil action—

"(1) which is a wrongful death action, and

"(2) with respect to which applicable State law (as in effect on September 13, 1995 and without regard to any modification after such date) provides, or has been construed to provide by a court of competent jurisdiction pursuant to a decision issued on or before September 13, 1995, that only punitive damages may be awarded in such action.

This subsection shall cease to apply to any civil action filed on or after the first date on which the applicable State law ceases to provide (or is no longer construed to provide) the treatment described in paragraph (2).".

(d) **EFFECTIVE DATE.**—

(1) **IN GENERAL.**—Except as provided in paragraph (2), the amendments made by this section shall apply to amounts received after the date of the enactment of this Act, in taxable years ending after such date.

(2) **EXCEPTION.**—The amendments made by this section shall not apply to any amount received under a written binding agreement, court decree, or mediation award in effect on (or issued on or before) September 13, 1995.